

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SARA A. RICHARDSON,

Plaintiff,

v.

CITY OF SPOKANE  
WASHINGTON; MARIE-CHRIS  
ROSENTHAL; PAUL WATSON; and  
JOHN ROYS,

Defendant.

NO: 12-CV-0577-TOR

ORDER RE: DEFENDANTS'  
MOTION TO DISMISS, ETC.

BEFORE THE COURT is Defendants' Motion and Memorandum of  
Authorities to Dismiss, or in the Alternative Finding the Request for Admissions  
Deemed Admitted, Compelling Discovery and For Costs and Attorney's Fees  
(ECF No. 26). This matter was submitted for consideration without oral argument.  
The Court has reviewed the briefing and the record and files herein, and is fully  
informed.

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## BACKGROUND

Plaintiff Sara Richardson sued Defendants City of Spokane, Officer Marie-Chris Rosenthal, Officer Paul Watson, and Sergeant John Roys in Spokane County Superior Court in August 2012, alleging violation of civil rights and custodial interference. ECF No. 1 at 8-9. Defendants removed the action to this Court. ECF No. 1. On October 15, 2013, Plaintiff's counsel, Richard D. Wall, moved the court for leave to withdraw as attorney for Plaintiff because of her lack of contact and his resulting inability to respond to discovery requests and otherwise prepare the matter for trial. ECF No. 21. He noted that Ms. Richardson had not replied to his phone calls or emails, and that his last in-person contact with her was in early August 2013. *Id.* at 2. The Court denied Mr. Wall's motion. ECF No. 22.

Defendants served their first set of interrogatories and requests for production on Plaintiff's counsel on October 3, 2013, and their first requests for admission and second set of requests for production on November 1, 2013. ECF No. 31 at 2. No answers have been received. *Id.* Pursuant to the Jury Trial Scheduling Order (ECF No. 17) the discovery cutoff is December 23, 2013. Ms. Richardson failed to appear for her deposition on December 12, 2013. ECF No. 30 at 2; ECF No. 31 at 2. On December 4, 2013, Defendants filed the motion now before the Court, arguing that the case be dismissed or, alternatively, that the outstanding requests for admission be deemed admitted and that plaintiff be

1 compelled to answer and respond to discovery. ECF No. 31 at 1-2.<sup>1</sup> Defendants  
2 claim they have been and continue to be prejudiced by their inability to seek  
3 discoverable material in a timely manner due to Ms. Richardson's willful and  
4 intentional actions. ECF No. 26 at 2-3.

5 Mr. Wall responds that he has not had any contact with Plaintiff for the past  
6 four months and is therefore unable to provide a meaningful response to  
7 Defendants' discovery requests or the motion to dismiss. ECF No. 29 at 2.  
8 Defendants note that to the best of Mr. Wall's knowledge, Plaintiff is in the city of  
9 Spokane, but has been unresponsive to all attempts to contact her. ECF No. 31 at 4.  
10 They argue that, after conversations with Mr. Wall, it is clear that the Court's  
11 scheduling order has been and will continue to be compromised by Ms.  
12 Richardson's actions. ECF No. 31 at 2-3.

### 13 DISCUSSION

14 Defendants request dismissal of the case, arguing that under the Federal  
15 Rules of Civil Procedure the Court may, upon motion, dismiss the case as  
16 sanctions for failure to comply with discovery. ECF No. 26 at 3.

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17  
18 <sup>1</sup> Defendants filed their Motion to Dismiss or in the Alternative Compel at ECF  
19 No. 26 on December 4, 2013; they filed an amended memorandum of point and  
20 authorities in support of this motion on December 18, 2013, at ECF No. 31.

Under Rule 37(d), “the court...may, on motion, order sanctions if...a party...fails, after being served with proper notice, to appear for that person’s deposition; or ...a party, after being properly served with interrogatories under Rule 34, fails to serve its answers, objections, or written response.” Fed. R. Civ. P. 37(d)(1)(A). “A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.” Fed. R. Civ. P. 37(d)(1)(B). “Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).” Fed. R. Civ.P. 37(d)(3). “Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” Fed. R. Civ.P. 37(d)(3). Rule 37 provides that such orders include:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) *dismissing the action or proceeding in whole or in part;*
- (vi) *rendering a default judgment against the disobedient party; or*
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

1 Fed. R. Civ. P. 37(b)(2)(A) (emphasis added).

2 In considering whether a dismissal or default is appropriate as a Rule 37  
3 sanction, the court is to consider: “(1) the public's interest in expeditious resolution  
4 of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to  
5 [the party seeking sanctions]; (4) the public policy favoring disposition of cases on  
6 their merits; and (5) the availability of less drastic sanctions.” *Wanderer v.*  
7 *Johnson*, 910 F.2d 652, 656 (9th Cir. 1990) (internal quotation omitted) (finding  
8 prejudice where defendants failed to appear at their depositions and repeatedly  
9 failed to comply with court orders to produce documents). The prejudice element is  
10 essential because “sanctions which interfere with the litigants' claim or defenses  
11 violate due process when they are imposed merely for punishment of an infraction  
12 that did not threaten to interfere with the rightful decision of the case.” *Id.* (internal  
13 quotation omitted). “Dismissal is a proper sanction under Rule 37(d) for a serious  
14 or total failure to respond to discovery even without a prior order” to compel  
15 discovery. *Sigliano v. Mendoza*, 642 F.2d 309, 310 (9th Cir. 1981) (holding that  
16 district court’s dismissal of case was appropriate under Rule 37(d) where Plaintiff  
17 failed to respond to discovery or a motion to compel, filed a motion for an  
18 extension for time to respond, missed a hearing, and moved to continue the  
19 rescheduled hearing).

1 Here, the first two *Wanderer* factors militate in favor of dismissal. The  
2 public has an interest in expeditious resolution, and the Court needs to manage its  
3 dockets; Plaintiff's unresponsiveness threatens both an expeditious resolution and  
4 the orderly and timely disposition of cases on the Court's docket. Likewise, under  
5 the third factor, Defendants are prejudiced by Plaintiff's noncompliance with their  
6 discovery and deposition requests. Their inability to get information from Plaintiff  
7 almost certainly hinders their ability to develop a defense, let alone to have a clear  
8 understanding of Plaintiff's grievances against the city and the officers.

9 As for factor four, though other, less severe sanctions are available, none  
10 address the root problem: the fact that Ms. Richardson has failed to respond to her  
11 own counsel's attempts to contact her, and thus any sanctions will be unknown to  
12 her. For example, the Court could impose the sanctions available under Rule 37(d)  
13 (3) ("[i]nstead of or in addition to these sanctions, the court must require the party  
14 failing to act, the attorney advising that party, or both to pay the reasonable  
15 expenses, including attorney's fees, caused by the failure was substantially  
16 justified or other circumstances make an award of expenses unjust"). However,  
17 such sanctions would be fruitless, since Plaintiff appears to be unreachable;  
18 nothing in the facts suggests that she would become aware of the sanctions, let  
19 alone that they would motivate her to prosecute her case.

1 Thus, factor four, which states the preference for resolution of matters on  
2 their merits, is the only factor militating for other sanctions than dismissal. Given  
3 the nature of this case, and the length of time (four months) that have elapsed  
4 without any word from, sight of, or contact with Plaintiff, the Court finds that  
5 dismissal is appropriate under Rule 37.

6 Defendants also cite Rule 41(b) as authority to dismiss:

7 [i]f the plaintiff fails to prosecute or to comply with these rules or a court  
8 order, a defendant may move to dismiss the action or any claim against it.  
9 Unless the dismissal order states otherwise, a dismissal under this  
10 subdivision (b) and any dismissal not under this rule—except one for lack of  
jurisdiction, improper venue, or failure to join a party under Rule 19—  
operates as an adjudication on the merits.

11 Fed. R. Civ. P. 41(b). Upon a motion to dismiss for failure to prosecute, a district  
12 court must weigh the following factors: “(1) the court's need to manage its docket,  
13 (2) the public interest in expeditious resolution of litigation, (3) the risk of  
14 prejudice to defendants from delay, (4) the policy favoring disposition of cases on  
15 their merits.” *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 651-52 (9th Cir.  
16 1991) (quoting *Citizens Utilities Co. v. American Tel. & Tel. Co.*, 595 F.2d 1171,  
17 1174 (9th Cir.), *cert. denied*, 444 U.S. 931, 100 S.Ct. 273, 62 L.Ed.2d 188 (1979)).  
18 “[T]he failure to prosecute diligently is sufficient by itself to justify a dismissal,  
19 even in the absence of a showing of actual prejudice to the defendant from the  
20 failure.” *Id.* (quoting *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976))  
(holding district court did not abuse its discretion in dismissing appellants’ action

1 where they delayed adjudication for nearly two years, repeatedly failed to respond  
2 to correspondence from appellees regarding discovery and arbitration, failed to  
3 appear at a scheduled meeting, misrepresented intentions to the court, and  
4 substituted counsel four times).

5 For the same reasons that Rule 37 warrants dismissal, so does Rule 41(b).  
6 This Court cannot manage its docket based upon Plaintiff's unilateral,  
7 unpredictable decision to indefinitely absent herself from the proceedings.

8 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 9 1. Defendants' Motion to Expedite (ECF No. 25) is **GRANTED**.  
10 2. Defendants' Motion and Memorandum of Authorities to Dismiss, or in  
11 the Alternative Finding the Request for Admissions Deemed Admitted,  
12 Compelling Discovery and For Costs and Attorney's Fees (ECF No. 26)  
13 is **GRANTED in part**. This action is **DISMISSED**. Defendant's  
14 alternative requests to deem matters admitted, to compel and for attorney  
15 fees is denied. All other pending motions and hearings are VACATED.

16 The District Court Executive is hereby directed to enter this Order, enter a  
17 judgment dismissing this action, provide copies to counsel, and CLOSE the file.

18 **DATED** December 23, 2013.



*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge